OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable William Curry
County Attorney
Burnet County
Burnet, Texas

Dear Sir:

Opinion No. O-4930
Re: Propriety and necessity of charging the jury on circumstantial evidence and on prima facie evidence, in a prosecution for hunting at night with a headlight, under Article 902 of the Penal Code.

This will acknowledge receipt of your letter of October 16, 1942, which reads in part as follows:

"A problem concerning the propriety and necessity of certain charges to a jury in a criminal case has presented itself. The problem is set forth in the question herewith submitted on a separate sheet. As to the matter of a brief, all contending parties agree that the one case cited in the question covers the case and announces the rule. The difference of opinion involves interpretation of the case of State v. Poteet, 133 S. W. (2d) Edition 581, cited therein."

We have carefully read the opinion in the case of State v. Poteet, 133 S. W. (2d) 581, which you say involves the precise point at issue.

Article 902 of the Penal Code is as follows: -

"It shall be unlawful for any person at any time of the year to hunt deer or any other

> animal or bird protected by this chapter, by the aid of what is commonly known as a head light or hunting lamp, or by artificial light attached to an automobile, or by the means of any form of artificial light. Any person violating any of the provisions of this Article shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum of not less than fifty ($50.00) dollars nor more than two hundred ($200.00) dollars, or by confinement in the county jail for not less than thirty (30) days nor more than ninety (90) days, or by both such fine and imprisonment. The possession of a headlight, or any other hunting light used on or about the head when hunting at night, between sunset and one-half hour before sunrise, by any person hunting in a community where deer are known to range, shall be prima facie evidence that the person found in possession of said headlight, or other hunting light, is violating the provisions of this article."

You state the testimony of the State's witness, a Game Warden, to be:

> "That he saw a pickup being driven at a very slow rate of speed up and down a country road in deer country at night. The defendant was driving the car, while an unknown person stood up in the bed of such pickup and shined the rays of an artificial light that he had on or about his head into the adjoining pastures and fields. No shots were fired. The witness could not tell whether the man standing up had a gun or not. The witness stopped the car but the man in the bed got away in the dark. The defendant, driver of the automobile, is being prosecuted as a principal. In his testimony the State's witness carefully follows the wording of the prima facie feature of the statute testifying to every element in that part of the statute. The witness testified 'that the

> man standing in the bed of the pickup was in possession of a headlight, or some other form of hunting light used on or about his head, while hunting at night, between sunset and one-half hour before sunrise, and that such person was then and there hunting in a community where deer were then and there known to range.
>
> "This testimony was denied by the defendant.
>
> "The defendant's counsel demands (1) that the court shall not instruct the jury as to the prima facie evidence feature of the statute; and (2) that the court shall submit the case on a charge of circumstantial evidence. The State contends the opposite, asking for a charge on the prima facie evidence feature, and denying that a charge on circumstantial evidence would be proper."

The act of hunting is one of the main and essential facts to be proved in this case in order to justify a conviction. Undoubtedly, the State relies upon circumstantial evidence to prove this main fact, since neither the defendant nor his companion is shown to have fired a shot nor to have been in possession of a weapon capable of killing a deer. It is true that one of the State's witnesses testified unequivocally that the defendant's companion was hunting; but it is evident, from the other facts stated by you, that such testimony was merely an inference on his part drawn from the surrounding circumstances actually observed by him.

From this point we wish to direct your attention to the following decision of the Court of Criminal Appeals of Texas:

Where one fact is proved from which another fact is to be inferred, the charge (on circumstantial evidence) must be given. Gentry v. State, 56 S. W. 68.

The conclusion that the accused participated in the attack on the deceased being but inference from other circumstances, law of circumstantial evidence should have been given. Davis v. State, 296 S. W. 895.

In a prosecution for burglary where all the evidence in relation to the breaking and entering is circumstantial, a charge on circumstantial evidence should be given, and the fact that accused had pleaded guilty of a theft of property stolen during the burglary, which plea is introduced in evidence does not dispense with the necessity of the charge on circumstantial evidence. Beason v. State, 67 S. W. 96, 69 L. R. A. 193.

It is therefore our opinion that a charge on circumstantial evidence should be given.

> "A 'prima facie case' is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence and warrant a conviction, if not encountered and controlled by evidence tending to contradict it, and render it improbable, or to prove other facts inconsistent with it." Words and Phrases, Vol. 33, page 545.
>
> "'Prima facie' means as it first appears; at first sight; at first view; on its face; on the face of it; on the first appearance." Words and Phrases, Vol. 33, page 542.
>
> "'Prima facie evidence' is merely proof of the case upon which the jury may find a verdict, unless rebutted by other evidence. In other words, prima facie evidence is not conclusive, but is such as may be overcome by evidence to the contrary; and such evidence is to be weighed together with the other evidence, and in connection with the reasonable

doubt and presumption of innocence which obtain in all criminal trials." Flaeck v. State, 30 S. W. 794. Also Stoneham v. State, 268 S. W. 156. Also citing Uptmore v. State, 32 S. W. (2d) 474.

In the case of Poteet v. State, 133 S. W. (2d) 581, cited by you, the Court of Criminal Appeals said:

"In submitting the case to the jury the trial judge gave in charge the prima facie clause of said article. Objection was interposed on the ground that it was not applicable under the facts of th present case. Appellant also complained because the court did not charge on circumstantial evidence, and presented one in proper form with request that it be given. If the court was right in giving the instruction on the prima facie feature of the statute, it obviated the necessity of charging on circumstantial evidence, otherwise the omission to charge on circumstantial evidence would be error. It will be noted that in the first part of Art. 902, P. C. it refers especially to hunting with lights commonly known as a 'headlight or hunting-lamp' by name, and then includes 'any other form of artificial light,' but restricts the prima facie feature of the statute to a 'headlight,' or any other 'hunting light used on or about the head.' It is unquestionably true that when appellant went into the pasture on the south side of the road he was not using what was commonly known as a 'headlight' or 'hunting lamp.' He had only an artificial light known as a 'flashlight.' He had it in his hand. It is true one of the State's witnesses testified that such a light could be used on the head by placing it in the hat crease, but there is no evidence that appellant was so using it on or about the head, and it is only when so used that the statute in question would make the possession of such a light as appellant then had prima facie evidence that he was

violating the hunting statute in question. The ordinary flashlight is an article of such common use that it may well be doubted that the Legislature would undertake to make the possession of one prima facie evidence against its owner unless he was using it on or about the head as the commonly known headlights or hunting lamps are used.

"It follows from what we have said that we think the trial judge fell into error in giving the prima facie charge complained of, and that upon another trial it should be omitted, and under the evidence as here found an instruction on circumstantial evidence would be appropriate."

In the recently decided case of Lollar v. State, 159 S. W. (2d) 130, the Court of Criminal Appeals in a case where accused was charged with possession of intoxicating liquor for purpose of sale held it was proper under the facts of that case to charge both on circumstantial evidence and on the prima facie feature of the statute. The opinion in that case is short, and we are quoting it in full:

"DAVIDSON, Judge.

"The unlawful possession of whisky for the purpose or sale is the offense; the punishment, a fine of $200.

"Appellant operated a filling station in the town of Winters. He and his wife lived and made their home in a room in the rear part of the building.

"Inspectors of the Texas Liquor Control Board, under authority of a search warrant, made a search of the premises. They approached the building from, and gained entrance thereto, at the rear. Upon entering, they found appellant's wife engaged in breaking six bottles of whiskey. Appellant was not present at that time. The size or capacity of these bottles is not shown, except that the officers testified that the combined content exceeded a quart.

"Appellant was arrested at the filling station, after the search, and, in the presence of the officers, broke a half-pint of whiskey, which he had on his person. Three other one-half pints of whiskey were found on his person.

"Appellant, testifying as a witness in his own behalf, admitted the possession of the four one-half pints of whiskey on his person. He explained his possession thereof by saying that, at his request, his son had purchased same for him, at a liquor store near San Angelo, and had returned with the whiskey and delivered it to him just prior to the search. He said that the other whiskey on the premises belonged to the son, who purchased it at the time he bought the whiskey for him. He denied any interest in, or control over, any of the whiskey on the premises.

"There was no direct evidence showing that appellant was engaged in selling whiskey. His guilt was made to depend upon an application of the prima facie evidence rule, Art. 666-23a, Sec. (2), Vernon's Ann. P. C., to the effect that possession of more than one quart of whiskey in a dry area shall constitute prima facie evidence that it is possessed for the purpose of sale. The whiskey found on appellant's person not being 'more than one quart,' his guilt must depend upon facts showing that he had the possession of the whiskey, or a part thereof, found on the premises, the bottles containing

which were broken by the wife.

"The conclusion is reached that, in order to show that appellant possessed such other whiskey, the State's case depended upon circumstantial evidence, and that the trial court erred in refusing to give appellant's special requested charge upon the law of circumstantial evidence.

"In view of another trial, the charge defining the term 'prima facie' should be so framed as not to shift the burden of proof and so as not to constitute possession of more than a quart of whiskey a presumption of guilt. For a definition of the term 'prima facie,' see Flocck v. State, 34 Tex. Cr. R. 314, 30 S. W. 794; Walden v. State, 100 Tex. Cr. R. 584, 272 S. W. 139.

"For the error discussed, the judgment is reversed and the cause remanded.

"PER CURIAM.

"The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court."

After a study of the Foteet case and the Loller case, cited above, which upon first reading appear to be in direct conflict, we have arrived at the conclusion that the holdings in these cases are harmonious.

It will be noted that Article 902, Penal Code, quoted supra, provides that in order for a prima facie case to be made, four seperate and distinct things must be proven, viz.: (1) That the defendant was, at the time charged in the complaint and information, a person hunting; (2) that he was hunting in a community where deer are known to range; (3) that he was then in possession of a

headlight or any other hunting light used on or about the head; (4) that he was hunting at night between sunset and one-half hour before sunrise. The evidence in the Poteet case was sufficient to show three of these four necessary elements in order to make out a prima facie case. One was lacking. He was not using a "headlight" and the flashlight he was using was not being used on or about his head. As this flashlight was not being used on or about his head, no direct evidence was presented that he was hunting by the aid of an artificial light; and whether he was hunting by the aid of said flashlight had to be inferred from circumstances. That is, it was only shown by circumstantial evidence. Hence, the courts in the Poteet case correctly held that the prima facie charge should not have been given.

It would follow that in any case, prosecuted under this article, where any one of the four necessary elements to be proven to make out a prima facie case was not shown by direct evidence, but depended upon circumstantial evidence, the court should not charge on the prima facie feature of the statute.

In the case presented to us whether the defendant was hunting at the time was not proven by direct evidence but must be inferred from other facts in evidence which facts were that the defendant was driving a pickup truck along a country road at night at a slow rate of speed in a community where deer are known to range, that a companion was standing in the bed of the pickup truck with an artificial light on or about his head, and that this companion fled upon being apprehended. No gun or weapon was shown to have been in the possession of the defendant or his companion.

In the Lollar case, the court held under the facts as shown that the court should have charged on circumstantial evidence and also on the prima facie feature of the statute.. It will be noted that in this case,

the existance of more than one quart of whiskey was proven by direct evidence and not by circumstantial evidence. The State relied upon circumstantial evidence only to show that the whiskey was in the possession of the defendant.

This prima facie feature of this statute in our opinion is of value to the State only in those cases where the headlight was shown by direct evidence to have only been in the possession of the defendant, and was not at the time being actually used as an aid to the hunting.

The statute provides that it shall be prima facie evidence that the person found in possession of said headlight, or other hunting light, is violating the provisions of this article. In the facts of this case as you submitted to us, you have proof of all four elements of the offense, viz.: (1) That the defendant was, at the time charged in the complaint and information, a person hunting; (2) that he was hunting in a community where deer are known to range; (3) that he was then using a headlight or other hunting light on or about the head; (4) that he was hunting at night between sunset and one-half hour before sunrise. All four of these elements have been proven sufficiently to go to the jury and a prima facie case is already made out. It follows then that there is no need or necessity for the State to rely upon the prima facie feature of this statute.

We also arrive at the same conclusion, that a charge on circumstantial evidence should be given, and a charge on prima facie evidence should not be given from the following process of reasoning:

The legislature in enacting prima facie provisions to criminal statutes does so for the purpose of aiding the State in making proof of some essential elements of the offense. In the offense of possession of intoxicating liquor for the purpose of sale, it is evident from the very nature of things that in most cases it would be difficult, if not impossible, to make actual proof that the liquor was possessed for the purpose of sale. Hence, the legislature provided that the proof of the possession of more than one quart

would be prima facie proof that it was possessed for the purpose of sale. Where the proof showed that the defendant actually sold one gallon of intoxicating liquor, delivered it to the buyer, and received from the buyer the consideration for same, there would be no necessity to charge on the prima facie feature of this statute. There was no "gap to bridge."

Also, in a theft case, where the defendant was apprehended in the actual taking of the stolen goods, it would be useless to charge the jury that the possession of recently stolen goods, unexplained, would make out a prima facie case.

We have the same situation in the case you submitted to us. Evidently, the prima facie feature of the statute was enacted to "bridge the gap" in those cases where the proof showed that the defendant at the time had a headlight, or other hunting light used on or about the head in his possession, but there was no proof that he was actually using it. To constitute the offense it is necessary that the person hunt deer by the aid of an artificial light, and the mere possession is not sufficient. The legislature merely says that proof of possession under the circumstances enumerated makes out a prima facie case that the artificial light was being used in aid of the hunting. The proof in the case you submit shows that the artificial light was being used and was used on or about the head. There is no "gap to bridge." Hence, no necessity for charging the jury on the prima facie feature of the statute.

Trusting that this opinion sufficiently answers your question, we are

Yours very truly

APPROVED DEC 8, 1942

Grover Sellers
FIRST ASSISTANT
ATTORNEY GENERAL

ATTORNEY GENERAL OF TEXAS

By W. V. Geppert
W. V. Geppert
Assistant